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Fenwick Employment Brief

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EMPLOYER HELD IMMUNE FROM LIABILITY UNDER THE COMMUNICATIONS DECENCY ACT FOR EMPLOYEE'S THREATENING EMAILS AND INTERNET POSTINGS

Although employee misuse of the internet is still rife with potential liability for employers, a recent California appellate court decision reduces the risk, at least as to one potential source of liability: the federal Communications Decency Act ("CDA"). In *Delfino v. Agilent Technologies, Inc.*, a third party filed a lawsuit against Agilent alleging that the Company was liable for threatening emails and electronic postings sent by an Agilent employee over the company's computer system. The court concluded that the employee's actions were "plainly outside the scope of his employment" and noted that the employee was acting "out of personal malice."

The court emphasized that Agilent was unaware of the employee's actions until it was contacted by the FBI, and that the company fully cooperated once it became aware of the situation. The court also noted that the employee was terminated a week after confessing that he did in fact send at least one of the threatening messages over Agilent's computer system.

In finding for Agilent, the appeals court held that while the Company was a provider of computer services and a publisher or speaker of information for purposes of the CDA, the company was immune because it was the employee who authored the offensive emails and postings. The appeals court observed that even if the company was not immune, Agilent would not be liable because there was no evidence that it was aware of the employee's behavior. Moreover, the company acted promptly once it learned that the employee was using company computers to make the threats.

The appeals court suggested that imposing liability on employers for employee misuse of company computers could have a "chilling effect" on free speech because it could motive employers to use "extreme employer oversight of employee activities" to protect themselves from liability. The court added that such a burden could be "enormous" for employers.

MEDIATION SETTLEMENT AGREEMENTS MUST INCLUDE CLEAR LANGUAGE DEMONSTRATING THE PARTIES' INTENT TO BE BOUND

On December 14, 2006, the California Supreme Court ruled in *Fair v. Bakhtiari* that, under the California Evidence Code, parties who mediate their dispute and sign a settlement memorandum, but who do not clearly demonstrate their intent that the memorandum be enforceable, cannot introduce the settlement in court and get enforcement of their agreement. The court held that settlement agreements produced as a result of mediation are not admissible unless they indicate on their face that the parties intended the agreement to be binding or otherwise enforceable. Although the California Legislature in enacting the Evidence Code section in issue does not require parties in mediation to use a "formulaic phrase," there must be some writing signed by the parties that indicates the agreement is enforceable and binding. Terms related to the eventual enforcement of the settlement agreement, like arbitration or forum selection clauses, are inadequate. The failure to clearly express the parties' intent will render the agreement inadmissible, and hence unenforceable. The message is clear: to make the settlement enforceable, it should explicitly state such an intention of the parties.

JURY AWARDS $2.25M IN SEXUAL AND RACIAL HARASSMENT CASE, INCLUDING $1M OF PERSONAL LIABILITY AGAINST THE CHAIRMAN

In a case illustrating the potential costs of failing to control the inappropriate behavior of senior executives, a federal jury recently found Jocks & Jills Restaurants and its chairman liable for sexual and racial harassment of the chain's highest-ranking female manager. The verdict follows six years of litigation, including a trip to the Eleventh Circuit Court of Appeals, which ordered a new trial earlier this year.

The plaintiff, Tracey Tomczyk, a Caucasian woman, first began working for the company in 1990 as a daytime manager and part-time bookkeeper at what was then a stand-alone restaurant. She rose through the ranks as the company expanded, ultimately becoming its controller. In 1997, after learning of Tomczyk's romantic relationship with an African American man, the company's chairman began a pattern of harassing verbal abuse relating to Ms. Tomczyk's interracial relationship. The chairman's inappropriate comments ranged from "Tracey's gone black. She'll never go back," to graphic statements about her physical attributes and her sexual preferences. In its order granting a new trial earlier this year, the Eleventh Circuit held that "the evidence proved a slew of vulgar and harassing comments that continued over a period of years."

After an 11 day trial concluding earlier in December, a jury of four men and four women found the chairman personally liable for $250,000 in compensatory damages and $750,000 in punitive damages. It also found the company liable for $300,000 in compensatory damages and $950,000 in punitive damages, for a total damages award of $2.25 million.

NEWS BITES

Alameda Court Lets $172 Million Verdict Stand in Meal Period Case

An Alameda trial court recently refused to set aside a $172 million verdict against Wal-Mart Stores Inc. in a missed meal break case, setting the stage for a likely appeal over the availability of punitive damages and the meaning of California's meal break law. *Savaglio v. Wal-Mart Stores Inc.* California Labor Code Section 512 requires that employers provide a 30-minute meal break for every five hours worked. Under Labor Code Section 226.7, workers are entitled to receive one hour of pay for each missed meal break. As reported in previous FEB issues, three California appeals courts have reached different conclusions about whether the one-hour payment is a penalty to employers or a wage to employees. That issue is now before the California Supreme Court, which will hear oral arguments in early 2007.

Congress Enacts Criminal Penalties For Pretexting

In response to the furor over HP's pretexting scandal, Congress passed, by unanimous consent, the *Telephone Records and Privacy Protection Act of 2006*. The law makes it illegal to obtain a person's telephone records without permission. The legislation, passed in December, provides for penalties of up to 10 years in prison and fines of up to $500.000.

DOL: Registered Representatives in Securities Industry Do Not Qualify for Overtime Under FLSA

In an Opinion Letter issued last month, the U.S. Department of Labor stated that "registered representatives" in the securities industry may properly be classified under the administrative exemption of the Fair Labor Standards Act, provided that their primary duty is not selling investments to clients. Following a number of recent sizable settlements of wage/hour class actions brought by securities brokers, this Opinion Letter should come as some relief to employers in the securities industry. Although the Opinion Letter is not binding, courts normally give deference to the Department of Labor's position.